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No. 99-1704

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In The

Supreme Court of the United States

INTER-MODAL RAIL EMPLOYEES ASSOCIATION, THOMAS FRANKS, CHARLES JONES, THOMAS MARTIN, HOYT JARRARD, ROBERT STEIN, and ROBERT JAQUEZ,

Petitioners,

vs.

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, THE ATCHISON TOPEKA & SANTA FE RAILWAY CO., SANTA FE TERMINAL SERVICES, INC., SANTA FE PACIFIC CORPORATION, IN-TERMINAL SERVICES, INC., and MI-JACK PRODUCTS, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In their Brief in Opposition to the Petition for Writ of Certiorari (hereinafter "Respondents' Brief") Respondents did not follow the order of points raised in the Petition. To facilitate the Court's consideration Petitioners will address the issues in the order raised by Respondents' Brief.

I. PETITIONERS HAVE NOT WAIVED THEIR ARGUMENT FOR APPLICATION OF A UNIFORM, ERISA-BASED LIMITATIONS TO CLAIMS UNDER SECTION 510 OF ERISA.

Although importing into Section 510 the limitations from other parts of ERISA is not Petitioners' main point, we note that Respondents' claim of waiver derives from factually incorrect assumptions. Respondents disingenuously argue that this issue was not raised below, and thus should not be considered by the Court. In the actual development of the case before the Ninth Circuit, however, Petitioners argued in both their Opening Brief, at pages 19-20 and 39, and in their Reply Brief, at page 5, that in light of the three-year limitations in Sections 413 and 4301 of ERISA,[1] applying California's one-year personal claim limitation recently made applicable to common law wrongful discharge claims, was too short and interfered with Congress' broad remedial purpose for Section 510 claims.

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[1] 29 U.S.C. §§ 1113 and 1451.

While Petitioners in light of the Ninth Circuit's decision in *Felton v. Unisource Corp.*, 940 F.2d 503, 510 n.10 and 513 (9th Cir. 1990), did not explicitly advocate importation of the ERISA limitations into their Section 510 case, they clearly placed those statutes of limitations before the appellate court. Indeed, in its decision the Ninth Circuit noted the rule that federal limitations will apply if a state limitation interferes with federal policy (Pet. Writ Cert. at App. I, page 5a). Unfortunately, the Ninth Circuit fails to perceive the adverse impact upon enforcement of the national labor policy which its new (1998) approach produces.

Where a federal claim is properly presented, a party can argue any point to support that claim and is not limited to the precise arguments raised below. *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 378-9, 115 S.Ct. 961, 130 L.Ed.2d 902 (1995). The Court in its consideration of an issue on certiorari draws a fundamental distinction between a new claim and a new argument in support of the same claim. *Id.* The issue below was whether Petitioners' Section 510 claims were timely filed, and Petitioners now urge that certiorari be granted for the Court to decide that their claims were timely. Petitioners advocated the Ninth Circuit's adoption of California's three-year or four-year limitations so as not to do violence to Congress' broad remedial purpose underlying ERISA. In so doing Petitioners relied upon the three-year limitations in Sections 413 and 4301 of ERISA. The question of adopting a federal statute of limitation is therefore properly before the Court, no matter how oblivious Respondents may be to the irony of their assertion of waiver. *See* Section V, *infra* at page 8.

II. PETITIONERS' ARGUMENT FOR APPLICATION OF A UNIFORM FEDERAL LIMITATIONS TO CLAIMS UNDER SECTION 510 OF ERISA IS MERITORIOUS.

Respondents point to a few courts which have opted not to import the three-year (and more) limitations in Sections 413 and 4301 of ERISA. Those decisions not to analogize to other sections of ERISA speak to little more than the need of the lower courts for direction in how they are to go about protecting the Congressional policy interest. Moreover, those cases are readily distinguishable. They appear not to have involved multiemployer plans such as the Teamsters funds involved in this discharge, or at most those courts rejected application of the federal limitation in Section 413 to Section 510 claims without any effort to develop a principled rule of decision. Here Petitioners argue that, in light of the broad remedial purposes behind ERISA and the imperative for uniform rules for multiemployer plans operating throughout the nation, ERISA's three-year limitations in either Section 4301 or 413 should apply instead of California's one-year personal claim limitation. This is an important question of federal law that has not been decided by the Court, but should be. Its presence makes this Petition ripe for a grant of certiorari. *See* Supreme Court Rule 10(c).

At page 7 of their Brief in Opposition, Respondents cite *Held v. Manufacturers Hanover Leasing Corp.*, 912 F.2d 1197 (10th Cir. 1991). *Held* rejected application of Section 4301's three-year limitation simply because that plaintiff was not covered by a multiemployer plan. *Id.* at 1200. Here, by contrast, Petitioners' rights to pension and

health and welfare benefits – interfered with by their "fire and rehire" discharge – were founded on the Teamsters National Master Freight Agreement and by the Western States Area Supplemental Agreement, both multiemployer plans covering employees in many states (E. 278-374).[2]

Respondents also cite *Teumer v. General Motors Corp.*, 34 F.3d 542 (7th Cir. 1994). That decision did not analyze the possible application of the limitations in Sections 413 or 4301 to the Section 510 claim, but merely found that these and other federal statutes of limitations were "not applicable here." *Id.* at 546. Other decisions cited by Respondents, *Sandberg v. KPMG Peat Marwick, LLP*, 111 F.3d 331 (2d Cir. 1997), *Wright v. Southwestern Bell Tel. Co.*, 925 F.2d 1288 (10th Cir. 1991), and *DeWitt v. Penn-Del. Directory Corp.*, 872 F.Supp. 126 (D. Del. 1994), discuss Section 4301's application to a Section 510 claim not at all. Likewise they engage in no meaningful analysis of Section 413's suitability as a source for analogy.

Respondents argue that the remedial section of ERISA covering multiemployer plans, Section 4301, is somehow less analogous to Petitioners' Section 510 claims than a state common law wrongful discharge limit drawn by case law from a state statute used for a host of unrelated torts such as false arrest and battery (Brief in Opposition at page 9). Respondents' argument provides no principled explanation for the incongruity between Congress having decided to allow at least three years for

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[2] References to the Excerpts of Record in the Ninth Circuit are made as "E."

other ERISA suits and the Ninth Circuit's decision that equally complex suits under Section 510 must be filed within one year. This case involves a mass "fire and rehire" discharge of all members of a collective bargaining unit in a calculated plan to strip away their rights to benefits set under existing multiemployer plans. This was not a piecemeal retaliatory discharge of one or a few employees for receiving benefits under a health plan. The plain language of Section 4301(1) makes a suitable source of analogy because it is more in harmony with the purposes of Section 510. "A . . . plan participant . . . adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan . . . may bring an action for appropriate legal or equitable relief, or both." 29 U.S.C. § 1451(a)(1). ERISA's remedial provisions covering withdrawal from multiemployer plans share a common Congressionally-mandated policy with Section 510 that makes them far more analogous to this cause of action than is the California statute enacted for a wide variety of common law tort actions, *see* Cal. Code Civ. P. § 340(3).

III. THERE IS A CONFLICT AMONG THE CIRCUITS ON CHOOSING THE LIMITATIONS TO APPLY TO SECTION 510 CLAIMS.

Respondents note that "almost" but not all (Brief in Opposition at page 12) of the circuit courts of appeal import a state's wrongful discharge limitation into a Section 510 claim. They cannot avoid conceding that the Eighth Circuit has adopted a wide array of contract limitations, and that the Eleventh Circuit in some states

imports those states' limitations for enforcement of statutory rights (Brief in Opposition at pages 13, 15). Application of either one of those analogies – written contract or statutory rights – by the Ninth Circuit here, instead of its labeling of these claims as "personal," would have resulted in a ruling that Petitioners' Section 510 claims were timely. The appropriate analogy should have been found by the lower courts in California's application of a four-year limitation in claims for breach of a written contract, Cal. Code Civ. P. § 337, or a three-year limitation in claims for enforcement of statutory rights, Cal. Code Civ. P. § 338(a). Thus, it is clear that a meaningful conflict exists among the circuits, and that this is a circumstance justifying certiorari. *See* Supreme Court Rule 10(a).

IV. APPLYING CALIFORNIA'S ONE-YEAR LIMITATION TO PETITIONERS' SECTION 510 CLAIM DEFEATED ERISA'S BROAD REMEDIAL PURPOSES.

Respondents' main argument for the one-year limitation chosen by the court of appeals is that Congress has applied shorter limitations to other employment claims. Here, of course, Congress chose none and relied on the judiciary to fashion suitable policies to effectuate its policy choices by analogy to harmonious limitations. Respondents cite the 180-day limit for filing an administrative claim with EEOC under Title VII of the Civil Rights Act (Brief in Opposition at page 19). Significant differences exist, of course, between those claims and ERISA Section 510. EEOC claims are normally relatively straightforward. They typically proceed against one employer only, mostly on behalf of a single employee.

They require no financial analysis of an employer's changes of operations to determine if the discharge is pretextual. Section 510 claims often arise out of a mass discharge against an entire group of employees for the purpose of interfering with rights under multiemployer plans covering health and welfare and pension benefits. They require investigation into underlying employer financial and economic issues, as well as interviewing large groups of potential plaintiffs after a national search for counsel. There exists a large and well-defined bar of plaintiffs' counsel for EEOC cases in every major city.

In Title VII Congress made an explicit choice of the statute of limitations. In Section 510 of ERISA it did not. The most telling distinction may well be that the 180-day limit for presenting a Title VII claim to EEOC requires only that an administrative complaint be filed, often (or perhaps usually) without counsel. If EEOC cannot broker a solution after or while it conducts its investigation, the complainant's time to actually file a case in court runs only after receipt from EEOC of a right-to-sue letter.

In the analogous sections of ERISA, Sections 413 and 4301, Congress chose a three-year limitation. There is no good reason to infer that Congress intended that a statute of limitation shorter than three years should apply to a Section 510 claim, nor any basis to postulate that Congress thought Section 510 cases would be easier and quicker to file than those under Sections 413 and 4301.

Respondents point out that some circuit courts of appeal in importing state wrongful discharge statutes of limitations have imposed time limits of two years or less on Section 510 claims (Brief in Opposition at page 19).

Respondents' argument begs the issue. They make no showing that any of those courts considered in a systematic fashion whether such short limitations advanced or undermined ERISA's broad remedial purpose made explicit by Congress in 29 U.S.C. § 1001 and its other national labor policy choices embodied in Section 510. Petitioners contend that short limitations eviscerate those Congressional purposes.

V. WAIVER OF STATUTE OF LIMITATIONS DEFENSE.

Respondents' argument against their having waived any statute of limitations defense assiduously avoids any address of the salient point, namely, whether Respondents forsook their defense by not pleading it until after Petitioners' first appeal to the Ninth Circuit **and** after this Court's decision in *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka,* 520 U.S. 510, 117 S.Ct. 1513, 137 L.Ed.2d 936 (1997). Respondents cite no authority in opposition to Petitioners' contention that the Ninth Circuit's ruling conflicts with decisions of this Court and another by the Third Circuit (*see* Petition at pages 25-7). Respondents fail to contest Petitioners' argument (*see* Petition at page 27) that Respondents enjoyed sufficient time in 1992 to formulate and plead by motion a full defense on the merits against this Section 510 claim, when this suit was filed over two years after the mass discharge, but chose not to contest on any statute of limitation issue. Thus, Respondents leave unaddressed the key policy concerns of the

Court in *Burnett*[3] and *Hardin*,[4] and leave unrebutted Petitioners' point of a sufficient conflict.

Similarly, Respondents provide no plausible explanation for their failure to raise the defense until 1997. The Court should grant certiorari to resolve whether Respondents waived their statute of limitations defense. This is a proper issue for the Court to grant certiorari because the Ninth Circuit's indulgent approach to Respondents' failure to plead in a timely fashion conflicts with the decisions of the Court and the Third Circuit previously cited. The court of appeals' harsh application of a new limitation, in sharp contrast to its indulgence of Respondents, is inconsistent with the broad remedial purposes of ERISA and at variance with the equitable focus of the Court's decisions cited above and in the Petition.

CONCLUSION

For the reasons in this Reply and in their Petition, Petitioners pray that the Court grant certiorari to resolve all the questions presented for review. The importation by the Ninth Circuit into ERISA of California's statute of limitation intended for personal injury and wrongful death cases has completely frustrated Petitioners' long-running effort to vindicate their rights conferred by Section 510. This injustice is the product of the court of

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[3] *Burnett v. N.Y. Cent. R. Co.*, 380 U.S. 424, 85 S.Ct. 1050, 13 L.Ed.2d 941 (1965).

[4] *Hardin v. Straub*, 490 U.S. 536, 109 S.Ct. 1998, 104 L.Ed.2d 582 (1989).

appeals' search for uniformity at the expense of enforcement of the national policy. Such judicial longing for clarity is a manifestation of the need for guidance by the Court. Clarity and simplicity of decision are not enough to justify undermining the national policy purposes.

Respectfully submitted,

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